

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

CIVIL NO. 12-257 (JB-LFG )

LARRY A. GOLDSTONE,  
CLARENCE G. SIMMONS, III, and  
JANE E. STARRETT,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL  
AUTHORITY**

Defendants submit *MHC Mutual Conversion Fund, L.P. v. United Western Bancorp, Inc.*, No. 11-cv-00624, 2012 WL 6645097 (D. Colo. Dec. 19, 2012) in an attempt to convince the court that their \$400 million accounting fraud is not actionable. *MHC Mutual Conversion Fund*, however, is inapposite for several reasons. First, it was decided under the heightened pleading standards of the PSLRA that do not apply to the SEC. *See* Plaintiff's Response to the Motion to Dismiss on Behalf of Defendants Larry Goldstone and Clarence G. Simmons (Dkt 50) at 25, 28-29. Second, its findings, on an issue of first impression regarding other than temporary impairment ("OTTI") analysis, were made under facts unique to that case and accounting standards not applicable here.<sup>1</sup> Other courts have cautiously avoided delving into defendants' opinions and beliefs at the motion to dismiss stage. *See* Dkt. 50 at 41. Finally, plaintiffs'

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<sup>1</sup> The MHC court considered OTTI analysis under accounting standards that became effective in July of 2009, and were thus inapplicable to the Defendants' 2008 analysis conducted. *See Id.* at \*8 n.5.

complaint in *MHC Mutual Conversion Fund* was found to be “void of any allegations that [defendant’s] statements regarding OTTI were subjectively false.” 2012 WL 6645097 at \*11.

In contrast, the allegations here establish Thornburg’s inability to hold assets; Thornburg’s failure to timely meet margin calls gave its lenders the ability to sell those assets, negating its ability to hold. Moreover, the SEC’s complaint alleges that Defendants did not believe they had the ability to hold assets to recovery and thus did not believe those assets were only temporarily impaired. For example, the SEC alleges that “Defendants knew, or were reckless in not knowing, that Thornburg did not have the intent or ability to hold its ARM Securities until maturity or until their value recovered in the market” and therefore, based on clear accounting guidance from Starrett, “the company was required to recognize more than \$400 million in losses associated with its ARM Securities on its income statement.” (Compl. ¶ 12). Thus, the SEC’s complaint alleges that Defendants’ OTTI analysis was both objectively and subjectively false.

DATED this 17th day of January, 2013

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### CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2013, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record.

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